

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CHAD EICHENBERGER, individually and on  
behalf of all others similarly situated,

*Plaintiff,*

*v.*

ESPN, INC., a Delaware corporation,

*Defendant.*

Case No.: 2:14-cv-00463

**PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS**

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## INTRODUCTION

In addition to being the “worldwide leader in sports” and operating its vast cable television network, Defendant ESPN, Inc. (“ESPN”) allows consumers to access its sports content on their computers (through its website), mobile devices (through its mobile application), and televisions, through content streaming devices. On the content streaming device Roku, ESPN offers a “channel,” known as WatchESPN (“WatchESPN” or the “Channel”), through which a consumer can view sports news, reports and other video media on his or her television.

Unbeknownst to users of WatchESPN, however, each time they view videos on the Channel, ESPN discloses their personally identifiable information (or “PII”) in the form of their Roku serial numbers (unique numbers associated with their specific Roku devices) and video viewing histories to data analytics giant Adobe Systems, Inc. (“Adobe”). When disclosed to Adobe—a company that specializes in gathering information that allows it to analyze the habits of and target specific consumers for advertising and the like—this information identifies specific individuals as having viewed specific videos.

Plaintiff Chad Eichenberger (“Eichenberger”) is one such consumer who subscribed to the Channel and whose unique Roku serial number and video viewing history ESPN disclosed to Adobe without authorization. In response, he filed the instant action and later, his First Amended Complaint (“Complaint”), on behalf of himself and all other subscribers to WatchESPN, alleging that ESPN violated the Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”), which expressly prohibits such disclosures of PII. ESPN now seeks dismissal of the case for two primary reasons.

First, ESPN argues that Eichenberger fails to state a claim because the Roku serial numbers it admittedly disclosed to Adobe do not *alone* identify specific individuals and therefore, do not constitute PII. (Presumably this means that ESPN believes the disclosure of something like a consumer’s actual name is necessary to constitute a violation of the statute, but that’s not made clear in its motion.) Failing that, it argues that even if the serial numbers could be considered PII in the appropriate context, Eichenberger has not made allegations sufficient to

1 suggest that such a context exists here. ESPN is mistaken on a number of levels.

2 For one, Congress and the courts have been clear that the term “personally identifying  
3 information” should be construed broadly to include information well beyond things like names  
4 and physical addresses, and that the analysis of what constitutes PII is contextual and requires  
5 case-by-case consideration of the circumstances of the alleged disclosure (e.g., whether the  
6 information disclosed is combined with other data to identify an individual). Thus, the question  
7 here is not whether the Roku serial number *alone* identifies a specific individual, but whether in  
8 the context of its disclosure to Adobe it does.

9 Moreover, Congress, the courts, government agencies and leading privacy researchers all  
10 agree that unique device identifiers, like the Roku serial numbers disclosed by ESPN here, can  
11 and are often used to identify specific individuals. Thus, because Eichenberger details in his  
12 Complaint how, as part of its business, Adobe links Roku serial numbers with, for example,  
13 identities, location information, and demographic details, to identify and track consumers across  
14 multiple devices and platforms, he has pleaded more than enough to state a claim for ESPN’s  
15 violations of the VPPA. That is especially true given that at this stage of the proceedings those  
16 allegations must be accepted as true and all reasonable inferences must be drawn in  
17 Eichenberger’s favor.

18 Second, ESPN argues that Eichenberger is neither a “subscriber” of the WatchESPN  
19 Channel nor a “renter” of its video materials, and therefore is not a “consumer” protected by the  
20 VPPA. Each of these arguments fails as well. Under the relevant authority and common usage of  
21 the term, Eichenberger sufficiently alleges that he was a “subscriber” of WatchESPN because he  
22 downloaded, installed, and used it to watch videos on his Roku device. Further, he has  
23 sufficiently alleged that he was a “renter” inasmuch as he provided valuable consideration to  
24 ESPN—in the form of his exposure to advertisements that resulted in ESPN receiving additional  
25 revenue—in exchange for a temporary license to watch videos through the Channel.

26 For these reasons and as explained further below, the Court should deny ESPN’s motion  
27 in its entirety and allow Eichenberger’s claim to proceed.

## **BACKGROUND**

ESPN, best known for its cable television channel of the same name, also offers the WatchESPN Channel for use on Roku streaming devices. (Compl. ¶ 1.) Through WatchESPN consumers can view “sports-related events [and] news, and ESPN’s own proprietary entertainment programming.” (*Id.* ¶ 13.) Relevant here, users of the WatchESPN Channel are not required to consent to the disclosure of their PII nor do they provide such consent. (*Id.* ¶ 12.) Nevertheless, each time a consumer watched a video on WatchESPN, ESPN disclosed such information to Adobe. (*Id.* ¶ 14.)

As part of its business, Adobe “collects an enormous amount of information about a given consumer’s online behavior (as well as unique identifiers associated with a user’s devices) from a variety of sources.” (*Id.* ¶ 22.) This allows Adobe to “provide insights into the behaviors and demographics of WatchESPN’s user base.” (*Id.* ¶ 21.) To create profiles identifying specific consumers, Adobe uses “behavioral data and unique identifiers, often supplied by hardware manufacturers.” (*Id.* ¶ 16.)

The records ESPN disclosed to Adobe included the title of each video the user watched, as well as the user’s unique Roku serial number. (*Id.* ¶ 45.) Eichenberger alleges that based on the massive stores of information Adobe possesses about individual consumers, the Roku serial numbers received by Adobe allowed it to identify specific users and associate them with specific video viewing histories. (*Id.* ¶¶ 45, 59, 60.)

For his part, Eichenberger downloaded and used WatchESPN to “watch sports-related events and news.” (*Id.* ¶ 42.) He never granted ESPN permission to disclose his PII to anyone. (*Id.* ¶¶ 12, 43, 44, 63.) But each time he viewed content on WatchESPN, ESPN disclosed his PII (in the form of his video viewing history and Roku serial number) to Adobe. (*Id.* ¶¶ 14, 45, 60.)

## **ARGUMENT**

“When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). “The court must

1 accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.”  
 2 *Sweet v. Hinzman*, 634 F. Supp. 2d 1196, 1200 (W.D. Wash. 2008). To survive such a motion, a  
 3 complaint need not plead “[s]pecific facts,” but instead, must contain a statement of the claim  
 4 that “give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it  
 5 rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
 6 U.S. 554, 555 (2007)).

7 **I. Eichenberger Adequately Alleges that ESPN’s Disclosure of His PII to Adobe**  
 8 **Identified Him as Viewing Specific Video Materials.**

9 ESPN asserts two challenges to Eichenberger’s claim that the information disclosed by  
 10 ESPN falls within the VPPA’s definition of PII. First, it argues that the Roku device serial  
 11 numbers cannot be used to identify individuals under any set of circumstances. And second, it  
 12 contends that even if a Roku serial number could act as such an identifier, Eichenberger has  
 13 failed to plead facts showing that is the case here. ESPN is mistaken on both fronts for several  
 14 reasons.

15 As an initial matter, Congress, the courts, and government agencies such as the Federal  
 16 Trade Commission (“FTC”) have all been clear that “personally identifying information”  
 17 includes much more than consumers’ actual names and physical addresses. Instead, PII can be  
 18 any type of information that, within a given context, serves to actually identify a specific  
 19 individual. (*See* Section I.A, *infra.*) Second, Eichenberger’s Complaint alleges facts sufficient to  
 20 show that the information disclosed by ESPN to Adobe identified him as having viewed specific  
 21 video materials. (*See* Section II.B, *infra.*) And third, none of the authorities relied on by ESPN  
 22 change the result. (*See* Section II.C, *infra.*) Accordingly, ESPN’s motion should be denied and  
 23 Eichenberger should be allowed to proceed with his claim.

24 A. The VPPA’s definition of PII is broad, and the context-based, case-by-  
 25 case analysis it requires supports the conclusion that Eichenberger’s Roku  
 26 serial number and video viewing history are PII.

27 The VPPA defines “personally identifiable information” as “*includ[ing]* information  
 which identifies a person as having requested or obtained specific video materials or services

1 from a video tape service provider.” 18 U.S.C. § 2710(a)(3) (emphasis added). That definition  
 2 does not limit PII to traditional methods of identification like names and addresses, but instead,  
 3 “plainly encompasses other means of identifying a person.” *In re Hulu Privacy Litig.*, No. 11-cv-  
 4 3764, 2014 WL 1724344, at \*\*7, 11 (N.D. Cal. Apr. 28, 2014) (“*Hulu*”). Nevertheless, ESPN  
 5 argues that the “machine serial number” and video viewing histories it disclosed in this case are  
 6 not PII and thus, does not fall within the purview of the VPPA. (Motion to Dismiss (“MTD”) at  
 7 8–9.) ESPN is wrong.

8 One court in the Northern District of California recently and comprehensively analyzed  
 9 the meaning of “personally identifiable information” under the VPPA and found that the  
 10 statutory language, legislative history, and case law confirm that a video viewing history tied to a  
 11 unique identifier—like a Roku serial number—could constitute PII. *See Hulu*, 2014 WL 1724344  
 12 at \*13. The *Hulu* court began by recognizing that the VPPA does not expressly address whether  
 13 unique user IDs constitute PII. *See id.* at \*7. Thus, it turned to the legislative history to determine  
 14 Congress’ intent in enacting the VPPA, which simply put, was “[t]o preserve personal privacy  
 15 with respect to the rental, purchase or delivery of video tapes or similar audio visual materials.”  
 16 *Id.* at \*8 (citing S. Rep. No. 100-599, at 2 (1988)). As Senator Patrick Leahy explained,

17 It is nobody’s business what Oliver North or Robert Bork or Griffin Bell or Pat  
 18 Leahy watch on television or read . . . In an era of interactive television cables, the  
 19 growth of computer checking and check-out counters, of security systems and  
 20 telephones, all lodged together in computers, it would be relatively easy at some  
 point to give a profile of a person and tell what they buy in a store, what kind of  
 food they like, what sort of television programs they watch . . . . I think that is  
 wrong . . . and I think it is something that we have to guard against.

21 S. Rep. No. 100-599, at 5–6.

22 The *Hulu* court also noted that the Senate Report includes a section-by-section analysis of  
 23 the VPPA, explaining that, “[u]nlike the other definitions in this subsection, [the definition of the  
 24 term ‘personally identifiable information’] uses the word ‘includes’ to establish a minimum, but  
 25 not exclusive, definition of personally identifiable information.” *Hulu*, 2014 WL 1724344 at \*11.  
 26 In that light, the court concluded that the VPPA does not limit identification of individuals  
 27 merely to traditional methods like “a name necessarily.” *Id.* (“One can be identified in many

ways: by a picture, by pointing, by an employee number, by the station or office or cubicle where one works, by telling someone what ‘that person’ rented.”). Instead, “the statute, the legislative history, and the case law . . . require the identification of a specific person tied to a specific transaction, and support the conclusion that [although] a unique anonymized ID alone is not PII . . . *context could render it not anonymous and the equivalent of the identification of a specific person.*” *Id.* (emphasis added).

The *Hulu* court’s analysis is consistent with findings by several government agencies and leading academics. By way of example, according to the National Institute of Standards and Technology (“NIST”), “PII is any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual’s identity . . . and (2) any other information that is linked or linkable to an individual[.]” *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)*, Special Publication 800-122. In reaching that conclusion, NIST identified two particularly relevant examples of PII: “Asset information, such as Internet Protocol (IP) addresses . . . or other *host-specific persistent static identifier that consistently links to a particular person* or small, well-defined group of people[.]” like the Roku serial numbers ESPN disclosed to Adobe here.<sup>1</sup>

Perhaps of equal importance is the FTC’s guidance on the issue. The FTC has concluded that it makes no difference whether the steward of data (like Adobe here) breaks up PII and stores it in separate repositories—its recent study of the industry made this point in response to data brokers’ claims that they didn’t maintain “profiles” on consumers. *See Data Brokers: A Call for Transparency and Accountability* (May 2014), available at

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<sup>1</sup> The *Hulu* court’s analysis is also consistent with that of renowned privacy scholars Arvind Narayanan and Vitaly Shmatikov, who have concluded that, “[w]hile some attributes may be uniquely identifying on their own, any attribute can be identifying in combination with others.” *See* Arvind Narayanan & Vitaly Shmatikov, Myths and Fallacies of “Personally Identifiable Information,” 53 *Comms. of the ACM* 24, 26 (2010). Notably, the researchers have reduced their theories to practice, demonstrating how seemingly unassigned personal attributes in a dataset may be combined with other sources to identify a specific person. *See* Arvind Narayanan & Vitaly Shmatikov, Robust De-Anonymization of Large Sparse Datasets, 29 *Procs. of the 2008 IEEE Symp. on Security & Privacy* 111 (2008).

1 [http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-](http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf)  
 2 [accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf](http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf), p. 22.  
 3 The agency’s investigation revealed that rather than storing the data in one location, the brokers  
 4 organized information by “events,” and performed queries to generate on-the-fly profiles on a  
 5 person. *Id.* Others substituted real names for unique identifiers. *Id.* at n.56. In either case, the  
 6 data is PII. This is the reality of modern computing and data analytics.

7 Accordingly, where, as here, a video service provider (like ESPN) discloses a unique  
 8 identifier (like a Roku serial number) and video viewing history to a third party (like Adobe),  
 9 which actually uses that information to identify specific individuals and the video materials they  
 10 viewed, the information disclosed is PII. *Hulu* at \*11 (“One could not skirt liability under the  
 11 VPPA, for example, by disclosing a unique identifier and a correlated look-up table.”).<sup>2</sup>

12 B. The Context of ESPN’s Disclosures: Eichenberger Alleges Sufficient  
 13 Facts to Show that the Roku Serial Number and Video Viewing History  
Disclosed by ESPN is PII in this Case.

14 Turning to the context of the disclosures in this case, ESPN argues that Eichenberger’s  
 15 allegations “do not concern any disclosure actually made by WatchESPN” that would identify  
 16 him, and therefore “these allegations are irrelevant to Plaintiff’s VPPA case.” (MTD at 10.) That  
 17 argument, however, ignores the Complaint’s plain language, where Eichenberger alleges that the  
 18 information disclosed by *ESPN* (i.e., his unique Roku serial number) identified *him* to Adobe as  
 19 having viewed specific video materials. (Compl. ¶¶ 14, 45, 57 – 61.)

20  
 21  
 22 <sup>2</sup> Importantly, the *Hulu* decision was on summary judgment, where the plaintiffs were no longer entitled to  
 23 the presumption that their allegations were correct and instead were required to produce evidence that the  
 24 disclosures at issue identified them specifically. It was for this reason—a lack of evidence that a unique identifier  
 25 had actually been tied to them specifically—that the *Hulu* Court ultimately granted summary judgment as to two  
 26 types of disclosures made. *See Hulu*, 2014 WL 1724344, at \*12–13. Here, by contrast, Eichenberger’s allegations  
 27 that Adobe actually identified him and the other Class members, (Compl. ¶¶ 14, 45, 57 – 61), must be taken as true,  
 and can also be plausibly inferred from the nature of Adobe’s business (i.e., identifying specific consumers using  
 persistent identifiers such as Roku serial numbers. (*See id.* ¶¶ 3, 14–17, 19, 21–32); *see also Sweet*, 634 F. Supp. 2d  
 at 1200.

1 From there, Eichenberger details how—given Adobe’s existing wealth of data about him  
 2 and the other Class members—the disclosures identified him as having viewed specific  
 3 materials, and “allowed Adobe to . . . attribute his viewing choices to his profile.” (*Id.* ¶ 60; *see*  
 4 *also id.* ¶¶ 21 – 32, 45.) What ESPN is alleged to have essentially done, then, is “disclose a  
 5 unique identifier” (his Roku serial number) to a third-party (Adobe) that already possessed a  
 6 “correlated look-up table.” *Hulu*, 2014 WL 1724344, at \*11. Given the context of the disclosures  
 7 at issue—that they were made to Adobe, which possesses troves of information on individual  
 8 consumers, including information obtained from Roku devices—the Roku serial numbers  
 9 disclosed were “not anonymous and [were] the equivalent of the identification of a specific  
 10 person.” *Id.* (explaining that *Pruitt v. Comcast Cable Holdings, LLC*, 100 Fed. Appx. 713 (10th  
 11 Cir. 2004) “suggests that if an anonymous, unique ID were disclosed to a person who could  
 12 understand it, that might constitute PII.”). As such, ESPN’s disclosures identified Eichenberger  
 13 as having watched specific video materials, and constituted disclosures of PII under the VPPA.

14 ESPN attempts to dispute these facts by attacking the allegations and asking the Court to  
 15 draw inferences in its favor. ESPN asserts that “[f]or Plaintiff’s theory of liability to make any  
 16 sense, Roku would need to be providing information to Adobe that Adobe could use to match a  
 17 user’s identity with his or her Roku device serial number.” (MTD at 12.) But that argument is  
 18 fundamentally flawed. It seems to assume that to be identifying, a disclosure must be tied to an  
 19 actual name and address. As the *Hulu* court noted, however, “[t]hat position paints too bright a  
 20 line.” *Hulu*, 2014 WL 1724344, at \*11. “The statute does not require a name.” *Id.* Instead,  
 21 Eichenberger need only allege that the disclosure involves the “identification of a specific person  
 22 tied to a specific transaction,” which, as explained above, he does. Furthermore, even if  
 23 Eichenberger’s theory *did* require that his viewing history be tied to his real-world identity, there  
 24 is no reason that Roku itself would have to provide the information allowing such a correlation to  
 25 be made. The information could come from other Roku channels, other data analytics or data  
 26 mining companies, or even from the consumer himself in other transactions with Adobe.

1 ESPN then goes on to attack Eichenberger's factual bases for asserting that the  
 2 disclosures here were identifying. First, it cherry picks from the allegations in the Complaint, and  
 3 latches on to Eichenberger's reference to the Roku privacy policy, asserting that nothing therein  
 4 establishes that Roku shares demographic information with Adobe. (MTD at 12.) This  
 5 misunderstands the Complaint. Eichenberger cites the privacy policy not to establish that Roku  
 6 itself disclosed serial numbers to Adobe, but rather, to establish that Roku itself considers serial  
 7 numbers to be personally identifying, (Compl. ¶ 18), which is not surprising, given that (as  
 8 explained above) relevant government agencies, academics and the data analytics industry all  
 9 agree that such data can be used to identify specific individuals. (*See* Section I.A, *supra*.)

10 Second, ESPN takes issue with Eichenberger quoting Christopher Comstock, a senior  
 11 project manager at Adobe, explaining how the company creates profiles on individual  
 12 consumers' online behaviors using unique identifiers from devices like the Roku. (MTD at 12–  
 13 13.) To make its point, ESPN sidesteps much of the article in which Mr. Comstock's quotes  
 14 appear, but selects a few statements that it believes cast doubt on Eichenberger's allegations that  
 15 Adobe is capable of using Roku serial numbers and additional PII to profile consumers. (*Id.*) But  
 16 what's critical amid ESPN's self-serving assessment of Mr. Comstock's comments is that ESPN  
 17 doesn't deny, nor could it, that Adobe can and is creating consumer profiles using, *inter alia*,  
 18 unique device IDs—it argues only that certain *interpretations* of those statements *suggest* that  
 19 Adobe *might* not be doing so.<sup>3</sup> Notwithstanding ESPN's arguments, Mr. Comstock casts any  
 20 doubt aside with his statement—which ESPN does not address—that Adobe has been collecting  
 21 “key assets and data . . . over the years” and is looking to “take advantage” of them in the context  
 22 of creating consumer profiles and providing more robust and targeted advertising solutions for its  
 23

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24 <sup>3</sup> ESPN argues that Mr. Comstock's statements suggest that Adobe is looking to take some action in the  
 25 future, but is not currently conducting its business in the ways Eichenberger alleges. (MTD at 12–13.) But, by way  
 26 of example, Mr. Comstock's statement that “Mobile is the current trend but as we add Internet-connected TVs, Roku  
 27 devices...” could also be interpreted to mean that Adobe is currently adding (or already has added) “Roku devices”  
 to the mix of platforms from which it collects consumer data. At worst, it's unclear, in which case the inference must  
 be drawn in Eichenberger's favor. *See Sweet*, 634 F. Supp. 2d at 1200.

1 customers. (*See* Dkt. 31-4 at 3.) Of course, that’s consistent with Eichenberger’s allegations that  
 2 upon receipt of his Roku serial number and video viewing history from ESPN, Adobe was able  
 3 to combine that data with other information it already possessed to specifically identify him.

4 Third, and similar to its arguments regarding Mr. Comstock’s statements, ESPN argues  
 5 that Eichenberger’s Complaint misinterprets a figure from Adobe’s marketing materials related  
 6 to the “depth of information captured by Adobe’s data analytics services.” (Compl. ¶ 30; *see also*  
 7 MTD at 13–14.) As ESPN points out, the figure comes from a white paper promoting Adobe’s  
 8 “Adobe Campaign” advertising service through which it helps companies “access data that  
 9 already exists internally” by “aggregating customer data from different systems and mak[ing] it  
 10 centrally available.” (Dkt. 31-5 at 2.) However, it does not follow (as ESPN contends) that ESPN  
 11 would have to be a customer of the Adobe Campaign service in order for Adobe to leverage the  
 12 sorts of data described in the white paper to identify specific consumers using, *inter alia*, their  
 13 Roku serial numbers. Instead, the key takeaway from the white paper (and consistent with  
 14 Eichenberger’s allegations) is that Adobe has access to that information, gathered from dozens of  
 15 its clients<sup>4</sup>—whether ESPN is one such client or not—and its public representations suggest that  
 16 it uses such information to identify specific consumers. But again, to the extent the white paper is  
 17 open to interpretation, all reasonable inferences must be drawn in Eichenberger’s favor at this  
 18 point. *See Sweet*, 634 F. Supp. 2d at 1200.

19 Fourth, ESPN challenges Eichenberger’s interpretation of the Adobe Analytics Privacy  
 20 Policy. (MTD at 14.) In that regard, Eichenberger alleges that the Privacy Policy shows that  
 21 Adobe does receive identifying information (including email addresses, account information, or  
 22 Facebook profile information) from its clients, supporting the inference that Adobe’s customer  
 23 profiles do identify individuals. (Compl. ¶ 28); *see also Sweet*, 634 F. Supp. 2d at 1200 (“The  
 24 court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the  
 25 plaintiff.”). ESPN points out that the Privacy Policy states that “Adobe does not use the

26 <sup>4</sup> *See* <http://solutionpartners.adobe.com/home/partnerFinder.html>.  
 27

information we collect for a company except as may be allowed in a contract with that company,’ which ‘is usually limited to providing [] services to the company,’” and that the only information shared between companies is “‘anonymous and does not identify individuals.’” (MTD at 14.) From this, ESPN surmises, it is impossible that Adobe could have combined client data and itself identified consumers. (*Id.*) ESPN’s challenge ignores the word “usually” in the Privacy Policy, as well as the fact that even if Adobe only shared anonymous information *among companies*, it would still have access to that combined information in identifying form, before anonymizing it. As such, a factual dispute exists regarding the implications of the Adobe Privacy Policy, and ESPN’s argument only serves to illustrate why dismissal on the pleadings, without discovery, would be inappropriate. *See Sweet*, 634 F. Supp. 2d at 1200 (noting that on a Rule 12(b)(6) motion, the Court must “draw all reasonable inferences in favor of the plaintiff.”).

At this stage, Eichenberger has alleged sufficient facts to show that Adobe received, by ESPN’s disclosures, information that “personally identified” him as having viewed specific video materials, and nothing more need be pleaded.

C. ESPN’s Cited Authorities do not Require a Finding that its Disclosures Were not PII.

None of ESPN’s cited authorities require a different result, nor are they sufficient to overcome the Rule 12(b)(6) standards, which require Eichenberger’s allegations to be accepted as true and all reasonable inferences to be drawn in his favor.

Not surprisingly, ESPN relies heavily on *In re Nickelodeon Consumer Privacy Litig.*, MDL No. 2443, 2014 WL 3012873, \*10 (D. N.J. July 2, 2014) (“*Nickelodeon*”), a recent case from the District of New Jersey. On ESPN’s reading, *Nickelodeon* dictates that information is only PII if it is an actual name or some close surrogate. (MTD at 7–8.) In that case, the plaintiffs brought VPPA claims alleging that the defendant had disclosed their online usernames, IP addresses, and device identifiers to a third party. *In re Nickelodeon Consumer Privacy Litig.*, MDL No. 2443, 2014 WL 3012873 (N.D.N.J. July 2, 2014). In its discussion, the *Nickelodeon* court began by examining the statute’s language, as well as the *Hulu* decision, and acknowledged

1 that “‘a person’ can be identified by more than just their name and address,” *id.* at \*19, including  
 2 “by a picture, by pointing, by an employee number, by the station or office or cubicle where one  
 3 works . . . .” *Id.* (quoting *Hulu*, 2014 WL 1724344, at \*11). Relying on the *Hulu* decision, the  
 4 *Nickelodeon* court concluded that in order to constitute PII under the statute, “information . . .  
 5 must, without more, itself link an actual person with actual video materials.” *See id.* (“This is a  
 6 cogent and reasonable reading of the statute, which on its face establishes that PII is  
 7 ‘information’ that itself must both ‘identif[y] a person’ and further identify that ‘person’ in  
 8 connection with ‘specific video materials or services’ ‘requested or obtained’ from a VTSP.”)

9 While the *Nickelodeon* Court recognized that electronic identifiers could, with context,  
 10 serve to identify specific individuals in a manner “akin to” a name, it nevertheless found that the  
 11 plaintiffs in that case had failed to plead any contextual facts sufficient to support such a  
 12 conclusion. *Id.* at \*20–22. Ultimately, the *Nickelodeon* court applied the *Hulu* analysis, and  
 13 found that due to a lack of allegations concerning context in which the information was  
 14 disclosed, the plaintiffs had only alleged disclosure of the “type of information that *might one*  
 15 *day* serve as the basis of personal identification after some effort on the part of the recipient,”  
 16 and therefore failed to state a claim. *Id.* at \*22 (emphasis added).

17 Here, by contrast, Eichenberger does not allege that Adobe “might one day” use the  
 18 information disclosed to identify him; rather, he alleges that because of Adobe’s existing stores  
 19 of data, the information ESPN disclosed *did* identify him at the time it was disclosed. (Compl.  
 20 ¶ 14, 45, 57–61.) At this stage, those allegations must be taken as true, and ESPN’s assertions to  
 21 the contrary—that, in actual practice, the information disclosed does not identify users—are  
 22 inappropriate for resolution without discovery. *See Livid Holdings Ltd.*, 416 F.3d at 946 (noting  
 23 that “the court construes the complaint in the light most favorable to the non-moving party”).  
 24 Additionally, given the nature of Adobe’s business and the way it operates, the disclosures  
 25 alleged by Eichenberger are largely similar to the Facebook disclosures recognized in *Hulu* and  
 26 cited favorably in *Nickelodeon*—just as Facebook’s core business involves and depends on  
 27 associating randomized Facebook IDs with specific individuals in a manner “akin to” a name,

1 Eichenberger alleges that Adobe's business involves and depends on associating device  
2 identifiers with specific individuals in a manner "akin to" a name. (Compl. ¶¶ 15, 16, 22.)

3 ESPN also relies on *Nickelodeon* to "dispel[] any notion that VPPA liability can be based  
4 on the actions of the recipient of unique, anonymous device identifiers." (MTD at 10.) This  
5 reasoning of the *Nickelodeon* decision ignores its clear endorsement of the *Hulu* court's context-  
6 dependent analysis. *See Nickelodeon*, 2014 WL 3012873 at \*9. To the extent *Nickelodeon* can be  
7 read to support such a proposition, however, it simply ignores practical realities. As the *Hulu*  
8 court noted, "[o]ne can be identified in many ways: by a picture, by pointing, by an employee  
9 number, by the station or office or cubicle where one works . . . ." *Hulu*, 2014 WL 1724344, at  
10 \*11. These examples demonstrate the importance of context and of the recipient's access to and  
11 knowledge of information that may render the disclosure identifying. For instance, were a video  
12 tape service provider to provide an employer with a list of its employees' video rental histories,  
13 listed by employee number and no other information whatsoever, such a disclosure would clearly  
14 be personally identifying. The same disclosure made to a passerby on the street would be  
15 meaningless. Likewise for a video tape service provider's disclosure of rental histories associated  
16 with specific Washington State driver's licenses. If disclosed to the Washington State  
17 Department of Licensing, such a disclosure would be personally identifying. If disclosed to a  
18 local restaurant, it likely would not. Here then, the scope of Adobe's existing databases is vitally  
19 important. And Eichenberger alleges that Adobe possesses stores of information and profiles of  
20 individual consumers of sufficient detail that ESPN's disclosures were personally identifying.  
21 (Compl. ¶¶ 15, 16, 19, 21–32, 45 58, 59.) At this stage, he need not allege anything more.

22 For the same reasons, ESPN's characterization of the *Hulu* case is misplaced. There, the  
23 court held that a Plaintiff's assertion that "[a]nonymous disclosures . . . hypothetically *could*  
24 *have been linked* to video watching" was insufficient to establish the disclosure of PII. *Hulu*,  
25 2014 WL 1724344, at \*1. While the plaintiffs in *Hulu* showed (*on summary judgment*) only that  
26 the third-party recipient had the "key" to allow identification of otherwise anonymous viewing  
27 histories—and expressly *did not* show that such a "key" was used. *See id.* at \*12 ("There is no

evidence that comScore did this. The issue is only that it could.”). Eichenberger here has alleged that Adobe *does* actually identify specific individuals as having watched specific video materials through the WatchESPN Channel, and is entitled to a presumption of accuracy in those allegations. (See Compl. ¶¶ 14, 45, 58 – 60.)

Equally misplaced is ESPN’s reliance on *Pruitt v. Comcast Cable Holdings, LLC*, 100 Fed. Appx. 713 (10th Cir. 2004) and *Viacom Int’l Inc. v. YouTube, Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008) for the proposition that unique identifiers can never be personally identifying. (See MTD at 9.) In *Pruitt*, the court held that because the information at issue—unique anonymous identifiers stored in Comcast cable boxes—had not been combined with the identifying information from Comcast’s own databases, it was not “personally identifying.” *Id.* Thus, while “*Pruitt* stands for the proposition that an anonymous, unique ID *without* more does not constitute PII . . . it also suggests that if an anonymous, unique ID were disclosed to a person who could understand it, that might constitute PII.” *Hulu*, 2014 WL 1724344, at \*11 (emphasis in original) (citing *Pruitt*, 100 F. App’x. at 716). However, the recipient of the Roku serial numbers in this case, Adobe, can *and does* identify specific individuals using those IDs, (Compl. ¶¶ 14, 45, 57–61), and therefore, *Pruitt* is inapposite.

Likewise for *Viacom*. As the *Hulu* court explained:

What was at issue [in *Viacom*], however, was not the users’ identities. Instead, because the case was a copyright case against YouTube, what mattered was the number of times the users viewed particular videos. [*Viacom*, 253 F.R.D. at 262.] YouTube “did not refute that the login ID is an anonymous pseudonym that users create for themselves when they sign up with YouTube which *without more* cannot identify specific individuals” *Id.* at 262. (emphasis added). The Court dismissed YouTube’s privacy concerns as speculative and ordered discovery. *Id.*

That result makes sense: the case was about discovery to establish copyright damages, not consumers’ identities. The consumer identities were not relevant. Indeed, Viacom issued a press release that the parties would anonymize the data before disclosure to address YouTube users’ privacy concerns. [Citation omitted.] Also, the decision does not provide enough of a factual context to determine whether the user IDs in *Viacom* identified a person or were anonymized. The case’s holding is relevant only to the extent that it recognizes that unique anonymous IDs do not necessarily identify people.

1 *Hulu*, 2014 WL 1724344, at \*\*9–10.<sup>5</sup>

2 \*

\*

\*

3 For these reasons, the Roku serial numbers disclosed by ESPN allowed Adobe to identify  
4 individuals, including Eichenberger, as having viewed specific video materials, and are  
5 therefore, PII.

6 **II. Eichenberger Falls Within the VPPA’s Definition of a “Consumer” Because**  
7 **He Downloaded, Installed, and Watched Video Content through the ESPN**  
8 **Channel on His Roku Device.**

9 ESPN next argues that Eichenberger is not a “consumer” as contemplated by the VPPA  
10 because he is neither a “subscriber” to nor a “renter” of “goods or services” as those terms are  
11 defined in the statute. (MTD 15–16); *see also* 18 U.S.C. § 2710(a)(1) (defining “consumer” as  
12 “any renter, purchaser, or subscriber of goods or services from a video tape service provider.”).  
13 ESPN is wrong—Eichenberger is both a “subscriber” and “renter” for the purposes of his VPPA  
14 claim.

15 **A. As an ESPN Channel Subscriber, the VPPA Applies to Eichenberger.**

16 ESPN first contends that Eichenberger is not a “subscriber” to WatchESPN because he  
17 supposedly failed to allege “that he provided his name or any other information to WatchESPN  
18 or that he viewed content regularly on WatchESPN.” (MTD at 15.) But those allegations are not  
19 actually required.

20 The VPPA does not define “subscriber.” *See* 18 U.S.C. § 2710(a). Thus the Court must  
21 “give [the term its] ordinary meaning.” *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187  
22 (1995). In the context of online services like WatchESPN, “subscribe” refers to “[a]n  
23 arrangement by which access is granted to an online service.”<sup>6</sup> The *Hulu* court confirmed as

24 <sup>5</sup> ESPN also relies on the cases of *Johnson v. Microsoft Corp.*, No. 06-cv-0900, 2009 WL 1794400 (W.D.  
25 Wash. June 23, 2009); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010 (N.D. Cal. 2012); and *Steinberg v. CVS*  
26 *Caremark Corp.*, 899 F. Supp. 2d 331 (E.D. Pa. 2012) to argue that the mere possibility of identification is  
27 insufficient to make information personally identifying. As described above, however, Eichenberger does not allege  
the mere possibility of identification, but rather that he has *already been* identified as having viewed specific video  
materials. (Compl. ¶¶ 14, 45, 58 – 60.)

<sup>6</sup> *See, e.g., subscribe (1.1)*, Oxford Dictionaries,

1 much, finding that an online video subscriber relationship existed where plaintiffs alleged that  
 2 “[t]hey visited hulu.com and viewed video contend,” “regardless of whether they were registered  
 3 and logged in.” *See In re Hulu Privacy Litig.*, No. 11-cv-3764, 2012 WL 3282960, at \*8 (N.D.  
 4 Cal. Aug. 10, 2012).<sup>7</sup>

5 Here, Eichenberger’s allegations fit the common usage of “subscribe” as used in the  
 6 online video service context. He alleges that he downloaded and installed WatchESPN (thereby  
 7 entering into an agreement with ESPN to deliver him streaming video content through the  
 8 Channel) and did in fact request and receive video content delivered by ESPN through  
 9 WatchESPN. (Compl. ¶¶ 10, 42, 56, 58.)

10 Notwithstanding, ESPN argues that Eichenberger didn’t subscribe to WatchESPN  
 11 because there’s no allegation that he “viewed content regularly,” as supposedly would be  
 12 required “to receive a periodical service regularly on order,” and thereby subscribe. (MTD at 15.)  
 13 But Eichenberger alleges that WatchESPN delivers ESPN’s proprietary programming, including  
 14 “Latest News” and live sporting events, (Compl. ¶ 11, Fig. 1; Compl. ¶ 13), which necessarily  
 15 re-cycle regularly. Thus, WatchESPN content is delivered to him regularly, whether he watches  
 16 it or not. (*See id.* ¶¶ 42, 56, 58.)

17 Like the plaintiffs in *Hulu*, then, Eichenberger used a video streaming service—provided  
 18 by ESPN—to view video content. (*Id.*) Thus, he is a “subscriber” under the plain meaning of the  
 19 term because he downloaded, installed, and used WatchESPN, through which video content was  
 20 delivered. *See In re Hulu Privacy Litig.*, 2012 WL 3282960, at \*8.

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23 <http://www.oxforddictionaries.com/definition/english/subscribe> (last accessed August 27, 2014); *subscribe*,  
 24 Encyclopedia.com, <http://www.encyclopedia.com/topic/subscribe.aspx> (last accessed August 27, 2014); *subscribing*  
 25 (2), FindMe Words, <http://www.findmewords.com/definition-of-subscribing.html> (last accessed August 27, 2014)  
 (“[A]rrange for access to an electronic mailing list or service.”).

26 <sup>7</sup> This usage of “subscribe” also fulfills the VPPA’s purpose of “preserv[ing] personal privacy with respect to  
 27 the . . . delivery of . . . audiovisual materials” by ensuring that the viewing records of streaming video users will  
 have their privacy protected. S. Rep. 100-599, (1988).

B. Because ESPN Provided Eichenberger a Temporary License to Access and View Videos in Exchange for Being Exposed to Advertisements, He is Also a “Renter” of Those Videos.

ESPN argues further that Eichenberger is not a “renter” (and therefore, not a “consumer”) of its video content either because he does not allege that he “paid any money to ESPN to use WatchESPN.” (MTD at 16.) That argument misses its mark too.

“Rent” commonly refers to the act of being “let or hired out at a specified rate[.]”<sup>8</sup> In other words, a “renter” relationship is based upon the exchange of “consideration” for the temporary use of property. Black’s Law Dictionary (3rd Pocket Ed. 2006). In line with this definition, “valuable consideration” is defined as “consideration that [] confers a pecuniarily measurable benefit on one party[.]” *Id.* As such, to be a “renter” does not require the exchange of money (as ESPN argues), but rather, the exchange of a benefit between parties.<sup>9</sup>

Eichenberger’s allegations demonstrate that he is a “renter” under the common usage of the term. In particular, he alleges that when he requested to “view specific videos” on WatchESPN, he was “exposed to Defendant’s advertisements” as consideration for obtaining the requested content. (Compl. ¶ 56.) He was required to watch these advertisements each time he requested video content on WatchESPN. (*Id.*) Thus, he conferred a benefit on ESPN by generating advertising revenues for it each time he requested video content from WatchESPN, and in exchange for that benefit, he was “grant[ed] [] a temporary license to access and view specific videos . . . .” (*Id.*)

Thus, Eichenberger can appropriately be considered a “renter” as well as a “subscriber” under the VPPA, and ESPN’s arguments in this regard should be rejected as well.

<sup>8</sup> *Rent* (1.2), [http://www.oxforddictionaries.com/us/definition/american\\_english/rent?q=rent](http://www.oxforddictionaries.com/us/definition/american_english/rent?q=rent); *see also rent* (1.1), *id.*, (defining “rent” as an act ([o]f an owner) let[ting] someone use (something) in return for payment).

<sup>9</sup> To the extent the *Hulu* Court held otherwise (MTD at 16), it improperly ignored the common usage of the term “rent.” *See* Black’s, *supra*; *see also* *Asgrow*, 513 U.S. at 187.

**CONCLUSION**

For the reasons stated above, Plaintiff Chad Eichenberger, individually and on behalf of all others similarly situated, respectfully requests that this Honorable Court deny ESPN's Motion to Dismiss in its entirety and award such other relief as it deems necessary, reasonable, and just.

Respectfully submitted,

**CHAD EICHENBERGER**, individually and on behalf of all others similarly situated,

Dated: August 27, 2014

By: /s/ Benjamin H. Richman  
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**CERTIFICATE OF SERVICE**

I, Benjamin H. Richman, hereby certify that on August 28, 2014, I served the above and foregoing ***Plaintiff's Response in Opposition to Defendant's Motion to Dismiss*** by causing a true and accurate copy of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 27th day of August 2014.

/s/ Benjamin H. Richman